United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6049-50-59

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF HARTFORD, on behalf of itself and its inhabitants, Miriam Jordan and Fannie Mauldin,

Plaintiffs-Appellees,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Defendants-Appellants,

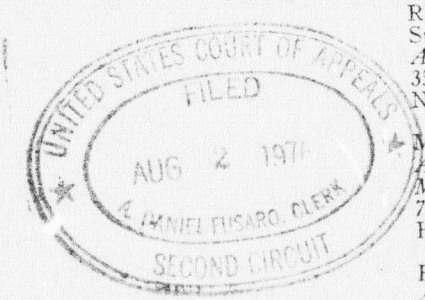
and

CARLA A. HILLS, in her capacity as Secretary of the Department of Housing and Urban Development; HAROLD G. THOMPSON, in his capacity as Acting Regional Administrator of the Department of Housing & Urban Development; LAWRENCE THOMPSON, in his capacity as District Director of the Department of Housing and Urban Development; and THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and the Towns of FARMINGTON, WINDSOR LOCKS, VERNON, and ENFIELD.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JOINT BRIEF OF PLAINTIFFS-APPELLEES CITY OF HARTFORD, MIRIAM JORDAN AND FANNIE MAULDIN



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JOINT BRIEF OF PLAINTIFFS-APPELLEES CITY OF HARTFORD, MIRIAM JORDAN AND FANNIE MAULDIN

Statement of the Issues

1. Was the procedure employed by the district court in accordance with the federal rules?

2. Did the City of Hartford and the individual appellees have standing to bring this suit?

3. Did the Secretary of HUD violate the Housing and Community Development Act of 1974 in waiving the requirement that applicants for community development funds complete the expected to reside portion of their housing assistance plans?

4. Was the court correct in concluding that the Secretary of HUD had abused her discretion in approving the East Hartford grant application?

5. Was the injunctive relief granted by the district court proper?

Preliminary Statement

The court below aptly described this case as "the culmination of a confrontation between the City of Hartford and seven of its suburban towns. At issue is the propriety of the decision by the United States Department of Housing and Urban Development (HUD) to approve federal community development grants to these towns" (A 40).

The district court determined that the plaintiffs were entitled to injunctive relief restraining the defendant appel-

lant towns from drawing upon the United States Treasury pursuant to the contested community development grants. The injunction is to remain in effect until such time as the towns, in cooperation with the federal government, comply with certain procedural requirements contained in the Housing and Community Development Act of 1974. The requirements in question promote the statutory goal of the "reduction of the isolation of income groups within . . . geographical areas . . . and . . . the spatial deconcentration of housing opportunities for persons of lower income. . . . ." 42 U.S.C. § 5301(c)(6).

This case raises critical issues relating to the proper implementation of a new statute establishing the framework for the federal government's entire subsidized housing and community development programmatic efforts. Under the appellants' theory no party may ever have standing to challenge a local community's non-compliance with this vital federal law. They also argue in effect that the provisions of the law may be modified at will by the federal agency charged with the duty of enforcement. Appellees assert that the court correctly determined that neither of these contentions are valid.

Statement of the Case*

The appellants contend that the proceedings below were carried out in abrogation of the Federal Rules, depriving them of basic procedural rights to challenge the evidence submitted by appellees. West Hartford and Glastonbury have raised this claim in their joint brief (adopted by East

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* In this brief references to the joint appendix are introduced with the letter "A"; references to the trial transcript with "T"; references to the transcript of the August 26, 1975 hearing with "Aug. 26, 1975, T."

Hartford) without fully reviewing all the minutes of the district court proceedings and apparently without having the benefit of the transcript of the August 26, 1975 hearing. In light of this procedural claim, the appellees set forth in detail what transpired below.

Proceedings Below

This action was filed on August 11, 1975. Plaintiffs included the City of Hartford, Connecticut, eight city officials and two representatives of a class consisting of minority as well as low and moderate income persons now living in inadequate and deteriorating housing in Hartford. The defendants originally were the United States Department of Housing and Urban Development (hereinafter "HUD"), its Secretary, the Acting Regional Administrator and the Hartford Area Director.

The plaintiffs challenged the approval by the federal defendants of grants in aid to seven suburban Hartford communities,* awarded pursuant to the Housing and Community Development Act of 1974, Public Law 93-383, 42 U.S.C. § 5301, *et seq.* The plaintiffs principally asserted that the federal defendants abused their discretion in approving the seven applications and violated provisions of the 1974 Act.

Simultaneous with the filing of the complaint, the plaintiffs sought temporary and preliminary relief restraining HUD from disbursing any of the approved monies to the seven towns. The court denied temporary relief, but ordered a hearing on the preliminary injunction motion for August 26, 1975.

The August 26th hearing, which is not reviewed in appellants' brief, was critical for setting the ground rules

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* The seven included East Hartford, West Hartford, Glastonbury, Windsor Locks, Vernon, Enfield, and Farmington.

and procedures to be followed in this matter.* All of the procedural questions raised by the appellants can be answered by an analysis of that hearing.

Prior to the August 26th hearing, the defendants moved to join all seven suburban towns as party defendants in the action, and the first order of business on August 26 was the granting of that motion (Aug. 26, 1975, T. 8). Appellants Glastonbury, East Hartford and West Hartford were all represented by counsel at that hearing.** In the course of the proceedings the appellants indicated to the court that they had obtained copies of the complaint and stipulated that they had been served. Arrangements were also made to insure immediate delivery of all other papers to the towns (Aug. 26, 1975, T. 48-50).

Throughout the August 26th hearing, there was discussion as to the need for expedited proceedings. The federal defendants advised the court that letters of credit had already been delivered to the towns and that the towns were therefore free to draw their grant monies from the United States Treasury (Aug. 26, 1975, T. 15). The record reveals that some of the towns had, in fact, drawn monies and were doing so on a continuing basis (Aug. 26, 1975, T. 13-16, 25-26, 51). The court itself, referring to the fund dispersals, stressed the need for an expedited hearing (Aug. 26, 1975, T. 46).

At this session, the federal defendants took the position that an evidentiary hearing was unnecessary to resolve

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* We note that all three appellants are represented by counsel who themselves did not participate in any of the proceedings in the District Court.

** East Hartford was represented by F. Timothy McNamara, who advised the Court that he also was authorized to speak for the corporation counsel of West Hartford (Aug. 26, 1975, T. 4). Glastonbury was represented by Walter A. Twachtman (Aug. 26, 1975, T. 2).

this case since the court had received affidavits filed by the plaintiffs in conjunction with their motion for a preliminary injunction and responding affidavits by the federal government. These submissions included the affidavits of the individual plaintiffs, affidavits of several Hartford officials, and affidavits of several HUD officials. None of the defendants below sought the taking of live testimony (Aug. 26, 1975, T. 33-37).

The appellants now inform this Court that "perhaps" at the August 26th session there was some discussion or implication that the next hearing would be considered a hearing on the merits. Indeed, the court on August 26th urged this procedure and the plaintiffs consented to a consolidation of the trial on the merits with the preliminary injunction hearing. The federal defendants continued to argue that no evidentiary hearing was necessary and raised no objection to a consolidation (Aug. 26, 1975, T. 30-31).

The role to be played by the towns, including the appellants, also was established on August 26th. All of the towns followed an approach of relying on the federal defendants to carry the burden of this litigation. For example, when counsel for the federal defendants indicated that a motion for summary judgment would be filed by the government to be returnable at the time of the hearing for the preliminary injunction, the towns said they would join in that motion. The court also stressed the need for a procedure whereby all the defendants would look to the federal defendants counsel for the defense. Thus, the court stated:

> With so many counsel for so many towns, I think it would be certainly helpful to the Court, and perhaps everybody, if they [the defendant towns] all took the position that Mr. McNamara [counsel for East Hartford and West Hartford] has taken—which is that they will tag along and support the federal defendant

and take the same position. Because that will then limit the proceedings (Aug. 26, 1975, T. 57-58).

The towns did not object to the court's request.

The procedure outlined by the district court at the close of the August 26th hearing called for the federal defendants to file a motion for summary judgment. This motion was to be submitted in advance of the hearing on plaintiffs' motion for preliminary injunction. In conjunction with the summary judgment motion, the government agreed to submit copies of the HUD administrative records for each of the seven grant applications challenged by the plaintiffs. The court stated that it would hear testimony, but sought to limit the scope of that testimony and rely on affidavits wherever possible. The government persisted in claiming that live testimony was unnecessary (Aug. 26, 1975, T. 40-45).

Immediately after the federal defendants moved for summary judgment, the towns joined in that motion by way of written stipulation (see Docket Entries Items 15, 19 and 28 as to appellants).

The appellants now contest the proceedings below, because no responsive pleadings were filed. That, however, was the appellants' decision, as was their choice to follow the government's lead. The appellants themselves determined it was in their interest not to file pleadings, motions or briefs.*

The trial on the merits was held on September 22-24. Contrary to the argument in appellants' brief that there was "confusion and disagreement" as to the nature and purpose of the hearings (Appellants' Br., p. 3), the court explicitly stated that this was to be a consolidated hearing

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* In fact, the only papers any of the towns filed below—other than counsels' appearances and joinder in the federal defendants' motions—related to requests for specific and limited types of relief from the terms of the injunction entered by the district court.

on the merits (T 552-556). The clerk's docket entry also clearly labeled the hearing as being on the merits (Docket Entry, Item 40a). The possible use of affidavits in lieu of testimony was also considered with the defendants themselves urging that procedure. In fact, only the plaintiffs argued that certain of these affidavits should be excluded and that the witnesses be required to testify in open court (T. 552-556).

At the close of the hearing, plaintiffs expressed concern that the funds which were the subject matter of the hearing were still being expended while the court was taking the case under advisement. Plaintiffs therefore renewed their application for a preliminary injunction to preserve the status quo while the court was considering the case on the merits. On September 30th the court granted that application and preliminarily enjoined the towns from drawing upon the federal treasury or expending any funds pursuant to the challenged grants (A 31).

On October 17, the Court heard arguments on the federal defendants' motion—joined in by the towns—to reconsider the issuance of the preliminary injunction. Also, Enfield and Windsor Locks sought alternative relief in the form of an amendment to the injunction to allow release of certain monies for ongoing projects. At this hearing, the court inquired and once again obtained the agreement of all parties that final judgment could be entered on the basis of the record as developed and as supplemented by certain affidavits (A 43). At this hearing the plaintiffs-appellees waived the objections they had raised on the final day of trial to the use of affidavits.

On October 29, the court issued an order denying the request to set aside the preliminary injunction, but granted in part the motions by Enfield and Windsor Locks for modification. The court permitted these towns to draw urgently needed funds which for the most part were to be expended for housing purposes. In its October 29 ruling

the court also preliminarily found the plaintiffs had standing to bring this lawsuit. 408 F.Supp. 879, 884.

On January 28, 1976, the court rendered its final decision and made permanent the preliminary injunction previously entered. The court held that "HUD acted contrary to law" in approving six of the grants notwithstanding the applicants' failure "to make any assessment whatsoever of the housing needs of low and moderate income persons who might be 'expected to reside' within their borders" (A 73). The court concluded that such assessments were a required and non-waivable aspect of the housing assistance plan (HAP) which must accompany community development applications (A 73). This conclusion was determinative as to appellants West Hartford and Glastonbury.

The issue with respect to East Hartford was somewhat different since that town had included an expected to reside figure in its HAP. However, the court found the proffered figure was legally inadequate since it was based exclusively on the waiting list of the town's own public housing authority. The court noted that that list

> may well be one factor upon which to base the 'expected to reside' projection, but it cannot properly be the only one . . . HUD had a duty to do more than accept any 'expected to reside' figure proposed by East Hartford, however inadequate its size or derivation. The administrative record discloses that it did not live up to that duty (A 86-87).

In enjoining use of the community development funds, the court specifically noted that "the Towns may seek to obtain a new approval of these grant applications from HUD. This injunction may be lifted upon the filing with the court of such a new approval" (A 88). Judgment was filed on February 10, 1976.

Appellant Glastonbury, along with defendant Vernon, filed post judgment motions, seeking an amendment to the

judgment or in the alternative for relief thereunder (Docket Entries, 65, 66). Prior to the April 14, 1976 hearing on these motions, Glastonbury advised the court it did not wish to have its motion heard, and subsequently withdrew it (Docket Entries, Items 75, 81). The Vernon motion, which requested relief by way of release of a $150,000 discretionary grant under the 1974 Act, was granted by the Court (Docket Entry, Item 84).

HUD, the principal defendant in this action, along with four of the Towns, chose not to appeal.

Statement of Facts

In order to view the facts in this matter in a proper context it is necessary to outline initially the statutory plan and goals enacted by Congress in adopting the Housing and Community Development Act of 1974.

1. The 1974 Act

In the 1974 Act Congress for the first time directly addressed the problems confronting urban areas and the racial and economic isolation of low-income citizens in deteriorated inner-city housing. This statute opens with a declaration by Congress that:

> [T]he Nation's cities, towns and smaller urban communities face critical social, economic and environmental problems arising in significant measure from—(1) the growth of population in metropolitan and other urban areas, and the concentration of persons of lower income in central cities; and (2) inadequate public and private investment and reinvestment in housing and other physical facilities, and related public and social services, resulting in the growth and persistence of urban slums and blight and the marked deterioration of the quality of the urban environment. 42 U.S.C. § 5301(a).

Congress stated its "primary objective" in enacting the community development provisions of the law is

> the development of viable urban communities, by providing decent housing and a suitable environment and expanding economic opportunities, principally for persons of low and moderate income. 42 U.S.C. § 5301(a).

As the district court noted, "Congress did not leave local communities with merely this broad statement of purpose" (A59). In addition to the general statement of purpose, the Act sets out seven specific goals (42 U.S.C. § 5301(c)(1)—(7)), "Thereby establishing national priorities to govern the use of community development funds" (A59). These goals for the most part stress that the funds be used principally for persons of low and moderate income and for housing or housing related activities. One of the seven goals of particular importance to this suit is:

> *the reduction of the isolation of income groups within communities and geographical areas* and the promotion of an increase in the diversity and vitality of neighborhoods through the *spatial deconcentration of housing opportunities for persons of lower income* and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income. 42 U.S.C. § 5301(c)(6) (emphasis added).

The specific activities for which community development funds may be used are set out in the statute. 42 U.S.C. § 5305. The 1974 Act consolidates and replaces a variety of earlier HUD community development subsidy programs.*

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* The programs consolidated by the 1974 Act into the community development block grant program include (1) Urban renewal (and neighborhood development programs) under Title I of the Housing Act of 1949; (2) Model Cities under Title I of the

(*footnote continued on following page*)

To accomplish its major goals, Congress placed emphasis on metropolitan-wide planning and equitable housing development on a regional basis. Thus, Congress barred HUD from approving any application for community development funds unless the applicant has submitted to the Secretary of HUD an application which "sets forth a summary of a three year community development plan which identifies community development needs, demonstrates a comprehensive strategy for meeting those needs, and specifies both short and long-term community development objectives which have been developed in accordance with area-wide development planning and national urban growth policies." 42 U.S.C. § 5304(a)(1).

The goal of expanded housing opportunities is to be accomplished through the submission of a housing assistance plan which "accurately surveys the conditions of the housing stock in the community and assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside in the community." 42 U.S.C. § 5304(a)(4)(A). HUD's regulations state that the expected to reside figure refers to lower income persons and families "planning or expected to reside in the community as a result of planned or existing employment facilities." 24 C.F.R. § 570.303 (b) (2).

The HAP also must contain a goal for the provision of assisted housing and a description of where such housing will be located with an emphasis on "promoting greater choice of housing opportunities and avoiding undue con-

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(*footnote continued from preceding page*)

Demonstration Cities and Metropolitan Development Act of 1966; (3) Water and sewer facilities under Section 702 of the Housing and Urban Development Act of 1965; (4) Neighborhood facilities under Section 703 of the Housing and Urban Development Act of 1965; (5) Public facilities loans under Title II of the Housing Amendments of 1955; (6) Open space land under Title VII of the Housing Act of 1961; and (7) Rehabilitation loans under Section 312 of the Housing Act of 1964. 24 C.F.R. § 570.1(c) (April 1, 1975).

centrations of assisted persons in areas containing a high proportion of low income persons . . . ." 42 U.S.C. § 5304(a)(4)(c)(ii). While the Secretary of HUD is authorized to waive completion by an applicant of various sections of the community development grant application, the HAP is the only substantive portion of that application which may not be waived by HUD. 42 U.S.C. 5304(b).

Under the structure of the Act, community development block grant funds may not be used for construction of new housing, although housing rehabilitation and other housing related activities are permitted. 42 U.S.C. § 5305. Monies appropriated under Title II ("Assisted Housing") of the 1974 Act are available for actual construction of new units. See 42 U.S.C. § 1437(f) (the "Section 8" program). The inclusion of the HAP in the community development portion of the Act (Title I) is, however, directly related to the Section 8 program. The HAP sets the framework for the eventual undertaking of construction of assisted housing and provides the impetus for community involvement in the Section 8 housing program. The HAP also operates to insulate a community from unwanted Section 8 housing by permitting the community to object to an application to HUD by developers for this type of assistance if the application is inconsistent with a HUD approved HAP. 42 U.S.C. § 1439.

2. The Application Process

The seven suburban towns submitted applications to HUD for community development funds in the spring of 1975. The final day for filing these applications was April 15, 1975. 24 C.F.R. § 570.300(a).

Prior to the submission to HUD, each of the town applications was forwarded as required by the Act (42 U.S.C. § 5304(e)) to the areawide planning agency for the Hartford region, the Capital Region Council of Governments (CRCOG) (A 176-177). The City of Hartford, the Connec-

ticut Commission on Human Rights and Education Instruccion, a Hartford based civil rights group, submitted comments to CRCOG on the appellants' applications. The Connecticut Commission's involvement in the review process was solicited by the HUD Assistant Regional Administrator for Equal Opportunity (A 340). After review, CRCOG forwarded the applications with a recommendation to the Hartford area office of HUD.

At HUD the applications were reviewed by various divisions in the area office. These reviews are documented on separate division reports which are contained in the administrative record for the application and made part of the record in this case. A major concern in the HUD review process generally related to the adequacy of the housing goals articulated and the HAPs set forth in the applications. The housing goals and the HAPs also were of principal concern to those submitting comments to CRCOG.

HUD considered that Hartford's comments on the town applications raised major problems. In a memorandum of April 30, 1975, the Regional Director in Boston wrote the Director of the Hartford area office, concerning the Hartford comments. He stated:

> In sum, these allegations are, in our opinion, well documented and of a very serious nature. Therefore, whatever your decision may be regarding this matter, please ensure that the administrative file reflects a reasonable decision making process (A 323).

On May 21, 1975, while HUD was still in the process of reviewing six of the seven challenged applications, David O. Meeker, Jr., Assistant Secretary for Community Planning and Development at HUD, issued a memorandum to all regional and area HUD offices revising the procedures with respect to completion of the expected to reside table in the HAP. The Meeker memorandum outlined the sources

of data from which a community could derive its expected to reside figure. Nonetheless, the memorandum offered an option whereby local communities would be permitted to obtain approval of first-year grant applications without submitting an expected to reside figure (A 139).

3. The Appellant Communities and Their Applications

(a) *West Hartford*

Appellant West Hartford is adjacent to the western border of the City of Hartford. In 1970, there were 68,000 persons residing in West Hartford of whom only 0.7% were non-white. The Town is a relatively affluent community where the median sales price for housing between November 1973 and November 1974 was $50,490. The bulk of its housing is single family, owner occupied units. The Town has a low vacancy rate (A 212).

West Hartford has experienced substantial commercial growth, with approximately 1,383,000 square feet of non-residential floor space being constructed in the town between 1970 and 1974. A large percentage of this space was for a major shopping mall and a new corporate office building. In 1972 almost 7,000 Hartford residents worked in West Hartford (A 212-213).

West Hartford applied for and was granted $999,000 of community development funds to be used primarily for interior street construction. West Hartford in its HAP set forth a zero figure in the expected to reside table (A 214).

The City of Hartford, the Connecticut Commission on Human Rights and Opportunities and Education Instruccion all submitted negative comments to CRCOG on the West Hartford application (W. Hartford Ad. Rec. Indexes F & H). CRCOG itself forwarded a negative recommendation to HUD on this application, advising that the West Hartford program did not reflect the needs of a broad

spectrum of low and moderate income persons, the town did not have sufficient affirmative action plans, the town's statement of housing needs was inadequate and the town's application "does not reflect the housing needs of the region" (W. Hartford Ad. Rec. Index D).

In the area office of HUD, the West Hartford application received a series of negative comments from various divisions concerning the town's housing goals and proposals (W. Hartford Ad. Rec. Index N). The area director of the Equal Opportunity Division recommended disapproval of the West Hartford application (W. Hartford Ad. Rec. Index N).

(b) *Glastonbury*

Glastonbury is a growing suburb southeast of Hartford, situated immediately south of East Hartford. In 1970 Glastonbury's population was 20,600 persons of whom only 0.7% were non-white. Glastonbury is a relatively affluent community and the median sales price for housing in the town between November 1973 and November 1974 was $46,780. Glastonbury is one of the largest towns in terms of area in Connecticut and approximately 25% of its land is vacant and developable. Over 75% of the homes are single family, owner occupied and the town has an extremely low vacancy rate (A 202-203).

Glastonbury has experienced substantial commercial growth in recent years with approximately 387,000 square feet of non-residential floor space being constructed between 1970 and 1974. A major proportion of this space involves several large shopping malls (A 203).

Glastonbury applied for and was granted $910,000 in community development funds. In its application Glastonbury advised HUD that one of its major goals was the expansion of job opportunities. In its application the Town set forth a calculation of the number of persons working in the community who had expressed an interest in

residing in Glastonbury and who would be eligible for federally-assisted housing under the Section 8 program. The application stated that these persons numbered 806. Nevertheless, Glastonbury submitted a figure of zero in the expected to reside table of its HAP (Glastonbury Ad. Rec. Indexes A & B; A 203-205).

Negative comments were submitted on the Glastonbury application by the City of Hartford and the Connecticut Commission on Human Rights and Opportunities (Glastonbury Ad. Rec. Index G). CRCOG forwarded its comments on the Glastonbury application to HUD on April 11, 1975. The forwarding letter explained that no recommendation was being submitted on Glastonbury because both a favorable recommendation and a negative recommendation on the application had been defeated by the CRCOG members. The letter did emphasize the Commission's concern over the proposed use of the community development funds by Glastonbury and referred to the town's own estimate of the 806 persons working in Glastonbury but unable to live there. The Commission stated that Glastonbury, while undertaking the survey, did not respond to this need (Glastonbury Ad. Rec. Index D).

At the area office of HUD, the various divisions which reviewed the Glastonbury application commented negatively as to the town's HAP and housing goals. The Equal Opportunities Division recommended disapproval of Glastonbury's application (Glastonbury Ad. Rec. Index M).

(c) *East Hartford*

East Hartford is located east of the City of Hartford. In 1970 there were 57,583 persons residing in the town of whom only 1.3% were non-white. East Hartford is a middle income area where the median sales price for housing between November 1973 and November 1974 was approximately $40,000. The town is comprised primarily of single family, owner occupied units and has a relatively low vacancy rate (A 179-182).

East Hartford has substantial employment opportunities. In 1970 there were approximately 43,000 jobs in East Hartford and the town had the highest concentration of manufacturing employment in the region. Between 1970 and 1974 there was either completed or under construction approximately 716,200 square feet of industrial and corporate floor space (A 182-184). Approximately 4,600 Hartford residents worked in East Hartford in 1972.

East Hartford applied for and was granted $440,000 under the community development program (East Hartford Ad. Rec. Indexes C & D). East Hartford was the only town of the seven local communities involved in this litigation which included a figure other than zero in the expected to reside portion of the HAP. The first HAP submitted by the town to HUD contained 135 units in the expected to reside table. This figure subsequently was reduced to 131 of which 78 were to be for elderly, 15 for large families and 38 for others.

East Hartford derived its expected to reside calculation exclusively from the waiting list of the town's own public housing authority (A 185-187).

Negative comments were submitted on the East Hartford application to CRCOG by the City of Hartford, Educatic Instruccion and the State Commission on Human Rights and Opportunities (E. Hartford Ad. Rec. Indexes F, H & I). CRCOG forwarded a favorable recommendation to HUD (E. Hartford Ad. Rec. Index E).

In the area office of HUD, the Equal Opportunities Division recommended disapproval of East Hartford's application. The HUD area economist, William Flood, commented that the methodology used by East Hartford for deriving its HAP figure was unsatisfactory. He also concluded that the insufficiency involved in using the public housing waiting list as a data base for the HAP was clearly inconsistent with generally available data (E. Hartford Ad. Rec. Index O). The area office itself in a

covering memorandum on the East Hartford application agreed with the City of Hartford that "a more comprehensive approach should be reflected in future HAPs" (E. Hartford Ad. Rec. Index J).

Jonathan Colman, Hartford's Director of Planning, testifying as an expert witness for the plaintiffs, stated that use of a public housing waiting list for estimating housing needs is "a very narrow perspective to utilize in terms of those who might need assistance." He explained that "only certain persons . . . actually qualify for public housing and there are other families who do not qualify for public housing, but do qualify for other subsidized housing program opportunities" (A 185).

4. The City of Hartford

The appellees submitted affidavits which document that the City of Hartford has a large population of low income and minority citizens and that the City is experiencing serious housing problems and shortages which are exacerbated by lack of appropriate housing opportunities in the surrounding surburban towns. The appellants submitted nothing to contradict this proof. The federal defendants in fact advised the court that they did not choose to dispute the figures contained in the affidavits and did not wish to cross examine the affiants. The appellants who had agreed to follow the lead of the federal defendants, raised no objections to the introduction of these affidavits (A 167-172).

The relative poverty of Hartford's population is confirmed by the fact that over 50% of the City's population is dependent upon public or general assistance benefits or living exclusively on Social Security or unemployment benefits (A 146). The City's Department of Social Services administers between 40-45% of the entire town general assistance caseload in the State of Connecticut and approximately 35,000 Hartford residents rely upon general or

public assistance benefits for their means of support (A 151). The official July 1975 City unemployment statistics showed a rate of 13.6%. This percentage does not take into account the many thousands of potential workers who have given up job hunting because of the unavailability of work (A 146). Further, minority unemployment in the City is much higher, exceeding 40% in some neighborhoods (A 146).

In 1970, 35.5% of Hartford's population was minority and that percentage has increased substantially since the census. Student enrollment in public schools is over 80% minority (A 148). The concentration of minority households in the City and "white flight" to the suburbs is so substantial that the region has been described as "a white noose around the City of Hartford" (A 147).

The district court found that, "the housing situation in Hartford is bleak" (A 46, n. 14). In support of that finding, the record shows that there are 16,000 sub-standard housing units in Hartford which constitute a substantial threat to the health, safety and welfare of the inhabitants of those units. The problem is intensified by the fact that the City has insufficient manpower and resources to eliminate substandard housing and to relocate families now living in such units (A 157). Nonetheless, over 60% (7,429 out of 12,132) of all subsidized housing units in the area comprising the 29 town Greater Hartford Region are now located in Hartford. Moreover, Hartford contains 71% of the low rent public housing units in the Greater Hartford Region, while the majority of the subsidized moderate rental public housing units in the suburban areas are limited to elderly persons (A 157). The disproportionate character of these allocations is confirmed by the fact that the City's population comprises only 24% of the region's entire population (A 156).

To alleviate Hartford's inadequate housing supply would require an immediate addition of 7,500 subsidized low and

moderate income units and an additional 2,500 units over the next one or two years. Were Hartford to obtain the requisite dollars to build these units, however, there is a lack of sufficient vacant land within the City for such a construction program (A 158).

The district court found that "the condition of the City of Hartford . . . stands in marked contrast to that which prevails in its suburban towns . . ." (A 47). The court made reference to a September 1974 study by the Brookings Institute.* The report compares the relative disparities in conditions between core cities and their surrounding suburbs in 58 metropolitan areas in the United States. The extent of disparity was considered within the categories of unemployment, population age, education levels, per capita income, poverty percentage and housing overcrowding percentage. The study showed that the disparity between Hartford and its suburbs was the third worst in the entire nation surpassed only by Newark, New Jersey and Cleveland, Ohio. The Hartford region was found to have the greatest disparity nationally on the poverty ratio scale (a comparison between city and suburbs as to relative percentages of families with annual incomes under 125% of the federal low income standard for that family); the second worst on the limited education ratio scale (percentage of population over 25 with less than a 12th grade education); the second worst on housing overcrowding and the third worst on both unemployment and per capita income comparisons.

The city-suburb disparity also was described at trial by Arthur Green, Executive Director of the Connecticut

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* The appellants take particular exception to the court's use of this study (Appellants' Br. pp. 17-18). This report, which is based totally on 1970 Census data, was prepared for and submitted to HUD. Further, it was attached to and made a part of the affidavit of councilman Richard Suisman which was admitted into evidence (A 149).

Commission on Human Rights and Opportunities. He stated:

> The greater region, I would characterize it—and this is rather well known—the core of that region, which is Hartford, is highly poor in terms of economic opportunities. Its racial makeup is largely black and Spanish speaking. As one goes from the core to the periphery of the region you'll find higher income groups, you'll find a predominantly white community, and the further you go from that inner core ring it becomes more and more rural and more and more predominantly white, and more affluent (A 297).

Repeated reference is made in appellants' brief to the fact that Hartford in completing its application for community development funds gave a zero expected to reside figure in its HAP. These references are made even though Hartford's application was never challenged in this lawsuit. At trial Hartford's Director of Planning did testify that a zero figure is consistent with Hartford's development patterns and trends. He stated that unlike the suburbs, the City is experiencing a substantial reduction in overall population, a substantial loss of manufacturing employment, a reduction in overall housing stock and a very limited increase in new residential opportunities (A 231-232). He noted that Hartford's HAP "also reflected the fact that the City already houses an overwhelming proportion of the subsidized housing units in the region, particularly public housing, and the fact that we have a very substantial and very significant existing housing need . . . which we must address initially as our paramount and immediate housing problem" (A 232). He further stressed that the City sought through its application to secure as much federal money as possible to assist its residents in providing decent housing and that the City's expected to reside figure was accurate and realistic (A 233).

ARGUMENT

I

The procedure employed by the court below to determine the issues was in full accordance with the federal rules of civil procedure.

Appellants argue that they were denied their day in court because a final decision was rendered on the basis of the evidence submitted at the preliminary injunction hearing. This argument, however, is factually incorrect. As appellees have noted (See pp. 6-7, *supra*), the hearing on the preliminary injunction motion was consolidated with the final hearing with the consent of the parties, and the parties agreed that the court could consider evidence submitted in affidavit form.

Appellants have not submitted any legal argument in support of their procedural claims. These claims are, however, reiterated throughout the appellants' brief. The appellees therefore deem it appropriate briefly to set forth the legal precedents with regard to the procedure employed below.

Of foremost importance is the fact that the questioned procedures concerning consolidation of the hearings and use of affidavits were adopted with the full concurrence of all the parties. This fact alone precludes the appellants from now objecting that the trial court relied on evidence which may have only been admissible at a preliminary injunction hearing. *SEC* v. *North American Research & Development Corp.*, 511 F.2d 1217 (2nd Cir. 1975). Here, the appellants not only failed to object to the use of affidavits, but explicitly accepted the accuracy of the factual contentions contained in those affidavits. Additionally, the appellants, having made use of affidavits in their own defense, cannot now complain of the ap-

pellees' use of affidavits. *Semmes Motor Inc.* v. *Ford Motor Co.*, 429 F.2d 1197, 1205 (2nd Cir. 1972).

Even if the appellants were not precluded from raising procedural objections on appeal because of their acquiescence below, the law fully supports the procedures employed by the court. Rule 65 of the Federal Rules of Civil Procedure explicitly recognizes the use of affidavits in preliminary injunction proceedings. *Wounded Knee Legal Defense/Offense Committee* v. *Federal Bureau of Investigation,* 507 F.2d 1281, 1286-87 (8th Cir. 1974); *SEC* v. *Vesco,* 358 F. Supp. 1186 (S.D.N.Y. 1973). The matter was consolidated with the final hearing pursuant to Rule 65(a)(2) in order to avoid unnecessary duplication at a second trial and to expedite the procedure. The appellants' acceptance of the allegations contained in appellees' affidavits fully justifies the district court's reliance on the information contained in those documents. See *Saunders* v. *Washington Metropolitan Area Transit Authority,* 359 F. Supp. 457 (D.C.D.C. 1973), *remanded* 486 F.2d 1315 (D.C. Cir. 1973).

The issue of consolidation of the preliminary injunction hearing with the trial, was raised at the August 26, 1975 hearing and at the trial. The question of the use of affidavits was considered at trial and at the October 17, 1975 hearing on the defendants' motion to reconsider the issuance of the preliminary injunction. At the close of the October 17th hearing, the court inquired and obtained the consent of the parties to render final decision on the record as developed. In light of these proceedings there is no basis for the appellants' objections to the procedures followed below.

II

The City of Hartford and the low-income appellees have standing to sue.

The district court held that both the City of Hartford and the low-income appellees have standing to bring this action. In reaching this determination, the court concluded that the appellees were within the zone of interests protected by the 1974 Act and that the appellees suffered injury in fact as a result of HUD's non-enforcement of HAP requirements of the Act. The appellants' attack on these conclusions has no merit.

1. The City of Hartford

The disparities which exist between Hartford and its surrounding suburbs (See pp. 18-21, *supra*) present precisely the problem Congress sought to correct by the 1974 Act. Congress stressed the critical social problems facing cities and other governmental units arising out of the pattern of "concentration of persons of lower income in central cities." 42 U.S.C. § 5301(a)(1). Through the Act Congress established a community development program to achieve the reduction of isolation of low and moderate income groups within geographical areas by promoting economically integrated housing throughout metropolitan areas. 42 U.S.C. § 5301(c)(6). While the 1974 Act is designed to improve the living conditions of lower income persons, Congress stressed the overall goal of revitalizing cities and stated its primary objective to be "the development of viable urban communities as social, economic and political entities. . . ." 42 U.S.C. 5301(c) This concern for reversing the pattern of urban deterioration confirms the district court's conclusion that, "there can be no doubt that the statute was intended to ameliorate the problems facing the City of Hartford. The plaintiff's allegations, and the statutory language, make it clear that

the City falls within the 'zone of interests' created by the Act" (A 47-48).

The appellants challenge Hartford's standing on the ground that the City is not the proper legal representative with authority "to sue the federal government as *parens patriae* for its inhabitants, nor has it alleged or shown such power to be necessary to it" (Appellants' Br., p. 16). The *parens patriae* doctrine is only a limitation, however, on a municipality's right to sue for its citizens and does not restrict a city's right "to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." *In re Multi District Vehicle Air Pollution D.C.L. No. 31* v. *Automobile Manufacturers Association, Inc.*, 481 F.2d 122, 131 (9th Cir. 1973). In this regard, Hartford's Charter of Incorporation specifically authorizes the City to sue and be sued. *Hartford Municipal Charter,* Ch. I, Section 1, Special Laws 1947, Act No. 30, Connecticut Gen. Assembly.

The appellants also argue that the Act applies only to the needs of low and moderate income people and "was not concerned with municipal corporations as governmental bodies, but merely as units defining the area of operation of grants and determining the programs and uses for federal funds" (Appellants' Br., p. 17). Certainly the Act focuses on the needs of lower-income persons, but as already noted, the revitalizing of cities is an explicit and independent goal of the federal legislation.

The purposes of the Act set forth in 42 U.S.C. § 5301 demonstrate the congressional appreciation of the interdependent needs of urban communities and their low and moderate income inhabitants. This case presents precisely the types of *congruent* interests which a municipality "might sue to vindicate." *In Re Multi District Vehicle Air Pollution, supra.* Both objectives—aiding lower-income persons and developing viable urban communities—are

essential goals of the Act and realization of either goal depends upon the attainment of the other.

To establish standing, the City must also show "injury in fact", demonstrating a concrete interest in the outcome of the suit sufficient to render it a case or controversy under Article III. *Singleton* v. *Wulff*, —— U.S. ——, 44 U.S.L.W. 5213 (July 1, 1976); *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972); *United States* v. *SCRAP*, 412 U.S. 669 (1973). The City of Hartford's injury and interest in this case flows from (a) the denial of the benefits of a major new congressional remedy for the plight of urban areas through geographical deconcentration of low-cost housing and (b) the City's financial stake in possible reallocation of community development grants which may be disapproved by HUD.

The condition imposed by Congress for obtaining community development funds consists of a commitment by an applicant community to accept federally assisted housing and to promote the spatial deconcentration of housing opportunities in metropolitan areas. The HAP is the critical vehicle leading to the eventual construction of Section 8 and other federally subsidized housing; the award of community development funds provides the impetus for suburban involvement in the federal housing programs. The district court referred to this system of conditioning federal funds on a housing commitment as a new "carrot and stick" approach (A 71). The *quid pro quo* that Congress imposed for obtaining federal funds is, as the district court stated, "one of the most important differences between the Housing and Community Development Act of 1974 and the categorical grant community development programs it replaced" (A 72).

Hartford todays bears the burden of finding solutions for its disastrous housing situation and providing for a population which is disproportionately comprised of lower-income citizens. The City already contains over 70% of

the low rent public housing units in the Greater Hartford region and lacks the vacant land upon which to build necessary additional subsidized units. To the extent the suburban communities in the Hartford metropolitan area are permitted to secure community development funds without providing a housing commitment through the expected to reside table, Hartford's housing crisis will persist and accelerate. HUD's failure to follow the statutory commands of the Act injures the City of Hartford directly and concretely by relieving the neighboring communities of their obligation to participate in low-cost federal housing plans and programs. Congress has, in effect, recognized that the problems confronting cities like Hartford cannot be resolved without coordinated regional housing programs. The completion of an adequate HAP is the critical operative factor leading to such programs.

The district court also held that the 1974 statute itself demonstrates that the injury in fact test was met by Hartford since it provides for the reallocation of funds from disapproved grants on a first priority basis to any metropolitan area in the same state (A 48-49). See 42 U.S.C. § 5306(e). The court stated, "Thus, if the plaintiffs are successful in their effort to overturn HUD's approval of these grant applications, and if the funds at issue are made available for reallocation, Hartford will be eligible to receive them, and will have a strong statutory priority" (A 49).

Hartford's claim to these funds is enhanced by HUD regulations which establish the priority for reallocation of funds. These regulations direct that reallocation first be to the *same* metropolitan area where the funds were initially designated. 24 C.F.R. § 570.409 (f) (1) (i).*

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* 24 C.F.R. § 570.409(f)(1)(i) was adopted on September 12, 1975, 40 Fed. Reg. 42347. See addendum to Appellants' Br. It established priorities on reallocation of first year community de-

(*footnote continued on following page*)

In an effort to minimize Hartford's financial interest in the possible reallocation of community development funds the appellants argue the City's stake is no greater than any of the other cities comprising the Hartford SMSA, which includes a total of 37 towns (Appellants' Br., p. 19). It is obvious, however, that if Hartford would have to compete with 36 other communities for the reallocated funds, that would not detract from the City's financial interest in the funds in question. In addition, Hartford certainly would have a particularly strong claim on these monies given the City's disproportionately large number of low-income citizens. But the appellants' 37 town figure has no applicability to this lawsuit as there is no showing on this record that any suburban communities other than the nine which applied for funds in 1975 (A 177) are even eligible to apply for an entitlement grant.

Furthermore, within any given SMSA, HUD may allocate an entitlement grant only to a "metropolitan city" or to a town which comes within the "hold harmless" provisions relating to communities which had participated in certain of the categorical programs replaced by the Act. 42 U.S.C. § 5306. A metropolitan city is defined in the Act as a central city or any other city in the metropolitan area with a population of 50,000 or more. 42 U.S.C. § 5302 (a)(4). There are no towns in the Hartford SMSA with populations of 50,000 or more which did not apply for community development funds in 1975. United States Department of Commerce, Bureau of the Census, *General*

(*footnote continued from preceding page*)

velopment monies. The lower court held that this provision would govern as to any redistribution that may occur as to funds affected by this lawsuit. 408 F. Supp. at 885. It might be noted that on May 27, 1976 HUD amended Section 507.409 to cover reallocation of funds for fiscal years 1976 and 1977. Pursuant to this amendment the same priority of distribution as used for fiscal year 1975 funds is to apply; reallocations are to be made first to the same metropolitan area. 41 Fed. Reg. 2174, May 27, 1976.

Population Characteristics, 1970, P.C. (1)—B8 Conn., Table 16.

Hartford's financial interest in the challenged funds is not in doubt. As the district court noted, the majority leader of the Hartford Court of Common Council advised the court that Hartford would apply for any of the 1975 community development funds that may become available as a result of this lawsuit. 408 F. Supp. at 885-886. In light of these financial considerations, Hartford certainly has demonstrated that it is in a position to "benefit in a tangible way from the Court's intervention." *Warth* v. *Seldin*, 422 U.S. 490, 510 (1975). See also *Singleton* v. *Wulff*, *supra*. The availability of federal funds, of course, will determine the extent to which Hartford can realize the intended benefits of the Act. The allocation of monies by HUD in an illegal manner reduces the pool of funds which Hartford can obtain and unjustifiably limits the City's capacity to participate in and benefit from the Housing and Community Development Act.

2. The Low Income Appellees

Appellees Miriam Jordan and Fannie Mauldin are both low income residents of the City of Hartford. (See affidavits of Jordan and Mauldin, dated July 1, 1975).

Appellee Mauldin moved to Hartford in 1975 after she and her family lost their home in Bloomfield, Connecticut, a suburb of Hartford, through foreclosure following the incapacitation and unemployment of her husband. Appellee Mauldin sought to find alternative housing in several Hartford suburbs but was unable to locate a dwelling that she could afford.

Appellee Jordan has been attempting to locate low cost or subsidized housing for many years. She has sought without success a low income subsidized unit in several suburban communities, as well as in Hartford. Appellee Jordan also has sought housing in East Hartford and West Hartford.

The district court was correct in concluding that these appellees come within the zone of interest created by the 1974 Act (A51-52). Again, the primary objective of the statute as stated by Congress is the provision of decent housing and a suitable living environment "principally for persons of low and moderate income." Congress repeatedly stressed that the funds made available under the Act are to be used for the benefit of low and moderate income persons. 42 U.S.C. 5301(c). Indeed, no grant may be approved by the Secretary of HUD unless the applicant certifies "to the satisfaction of the Secretary that its community development program has been developed so as to give maximum feasible priority to activities which will benefit low- or moderate-income families or aid in the prevention or elimination of slums or blight." 42 U.S.C. 5304(b)(2).

The low income appelles are injured by HUD's failure to enforce the spatial deconcentration provisions of the HAP since they are thereby deprived of the critical vehicle prescribed by Congress for promoting construction of subsidized housing on a metropolitan basis. If the appellant towns were in compliance with the Act, they would be required to develop plans for subsidized housing that would materially increase the appellees' housing opportunities. If, on the other hand, the appellants do not participate in the community development program, then Hartford would be able to apply for these extra funds for the primary benefit of its low and moderate income citizens, including these appellees. The low income appellees therefore share an economic interest in this lawsuit with the City of Hartford.

3. Recent Standing Decisions

In recent months the Supreme Court and this Circuit have rendered decisions which reiterate the obligation of a party to establish a clear and perceptible harm in order

to establish standing to sue. Nonetheless, broad standing is still available to individuals who challenge federal administrative actions under the Administrative Procedure Act, 5 U.S.C. § 702. *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970). See, also, *United States* v. *SCRAP, supra; Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971); *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *Adams* v. *Richardson,* 480 F.2d 1159 (D.C. Cir. 1973) (en banc); *Jones* v. *Tully,* 378 F. Supp. 286 (E.D.N.Y. 1974), *aff'd per curiam sub nom., Jones* v. *Meade,* 510 F.2d 961 (2nd Cir. 1975).

In *Data Processing* the Court set forth the two pronged zone of interest and injury in fact tests and stated that, "Where statutes are concerned, the trend is toward the enlargement of the class of people who may protest administrative action." 397 U.S. at 154. In *SCRAP* the Supreme Court upheld the standing of individual plaintiffs to challenge a rate increase by the Interstate Commerce Commission. The Court held that the ICC action could adversely affect the environment in recreational areas used by the plaintiffs and the plaintiffs were therefore aggrieved persons within the scope of the APA to question whether the ICC had met the requirements of the Environmental Protection Act of 1969.

In *Simon* v. *Eastern Kentucky Welfare Rights Organization,* —— U.S. ——, 44 U.S.L.W. 4724 (June 1, 1976), the Supreme Court held that several indigent persons lacked standing to challenge a change in an Internal Revenue Service (IRS) ruling.* The challenged ruling allowed

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* In *Simon* the Supreme Court discussed *SCRAP* and noted the "attenuated line of causation" in *SCRAP* between the plaintiffs' harm and the challenged governmental action. The Court stated that the complaint in *SCRAP* withstood a motion to dismiss although it might not have survived challenge on a motion for

(*footnote continued on following page*)

non-profit hospitals to maintain tax exempt status under the Internal Revenue Code while permitting only emergency room service to indigents and foreclosing such persons from in-hospital care. The plaintiffs argued that if non-profit hospitals were required to provide in-hospital care as a condition for tax-exempt status, these hospitals would be encouraged to provide treatment to the plaintiffs. In denying standing, the Supreme Court pointed out the high degree of uncertainty in the plaintiffs' premise that "denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire." 44 U.S.L.W. at 4729. The speculative nature of the petitioners' claim necessitated denial of standing.

The *Simon* Court did confirm that the *Data Processing* ruling expanded standing to challenge agency actions. The Court pointed out, however, that the *Data Processing* rule did not constitute an abandonment of the requirement that the parties seeking court review must suffer an injury. The *Simon* court in its ruling was consistent with *Data Processing,* in that the alleged injury in *Data Processing* was

> "directly traceable to the action of the defendant federal official, for it [the complaint] complained of the injurious competition that would have been illegal without that action. . . . In the instant case respondent's injuries might have occurred even in the absence of the IRS Ruling that they challenge; whether the injuries fairly can be traced to that Ruling depends

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summary judgment. 44 U.S.L.W. at 4730, n. 25. The Court thus emphasized that past the pleading stage a plaintiff must establish that the harm alleged flows clearly from the challenged agency action. In the instant case the appellees have satisfied that obligation.

upon unalleged and unknown facts about the relevant hospitals." 44 U.S.L.W. at 4730, n. 25.

This Court, in its recent ruling in *Evans* v. *Hills,* No. 74-1793 (2nd Cir. June 4, 1976) (en banc), also stressed the obligation of the district court to scrutinize the alleged injury and requested relief to determine a sufficient nexus between the two before granting standing. In *Evans* Judge Moore, writing for the majority, concluded that the "appellants have failed to allege *any facts whatsoever* indicative of injury suffered by them as a result of the grants to the [Sewer] District and the Town. . . . They claim only that, had the grants not been approved, the monies *could conceivably* have gone to some other, as yet *totally imaginary* project in the County which *might* have had the result of making more housing available to them." Slip Op. 6773 (emphasis in original).

Judges Mansfield and Timbers, without whom there would not have been a majority in *Evans,* joined in a concurrence and set forth the same principle. After expressing sympathy for the principle "of providing ready court access to those who seek enforcement of civil rights legislation," Judges Mansfield and Timbers stated that, "a holding that federal grants-in-aid may be attacked by persons unaffected by them would violate basic standing requirements. . . . There is not the slightest indication in the present record that the plaintiffs will be adversely affected by the federal funding of the New Castle sewer and recreation projects or that if the funding were enjoined as demanded the plaintiffs would be benefited." Slip Op. p. 6779.

The instant case is in total contrast to *Evans.* In fact, the reasoning of the Court in that case supports the appellees' claim to standing here. Unlike *Evans,* where the plaintiffs were unable to show how the availability or nonavailability of federal monies to build sewers or a recrea-

tion area in New Castle would affect them, the appellees here have demonstrated that they will be injured if the appellants receive community development funds without compliance with the statutory requirements of the 1974 Act. Appellees have also demonstrated that the injunction will benefit them in that the towns will either commit themselves to a housing plan responsive to appellees' needs or Hartford may apply for the additional reallocated funds to benefit low income residents of the City.

Neither the *Simon* nor *Evans* cases dealt with clear congressional policies comparable to those articulated in the 1974 Act. In *Simon* the plaintiffs could only claim that tax exempt institutions must serve a "charitable" purpose. The Supreme Court noted that the Internal Revenue Code did not define the term charitable and "the status of each non-profit hospital is determined on a case-by-case basis by the IRS." 44 U.S.L.W. at 4725. Similarly, in *Evans* the plaintiffs' goal to compel HUD to engage in "affirmative action" as prescribed by the Fair Housing Act of 1968, leaves unresolved the detailed nature of the agency's duties and responsibilities in securing that goal. There is no similar lack of precision, concerning the congressional purpose in the instant case. The remedy afforded the plaintiffs by the district court directs compliance with a clear statutory requirement pertaining to the obligation of applicant towns to submit an accurate and reasonable expected to reside figure in their HAP. And, of course, the *Simon* and *Evans* matters did not involve a financial interest claim as is present here. Cf. *Singleton v. Wulff, supra.*

Finally, as to Hartford's claim to standing, Chief Judge Kaufman noted in his dissent in *Evans* that even under the majority's decision, "an inner city near a town receiving a HUD grant may have standing to challenge the grant. Indeed, a town which unsuccessfully applied for a grant might, by analogy with those cases granting competitor

standing, be allowed to sue." Slip Op. at 6806, n. 10. A similar view was expressed by Judge Pollack in the district court when he originally ruled in *Evans* that the plaintiffs lacked standing to sue. *Evans* v. *Lynn*, 376 F. Supp. 327, 333 (S.D.N.Y. 1974).

III

The district court correctly concluded that the Secretary of HUD violated the provisions of the 1974 Act in waiving the statutory requirement that applicants for community development funds submit a complete Housing Assistance Plan.

The district court held that the Secretary of HUD, in approving the applications of the defendant towns which contained zero expected to reside figures in their HAPs, violated the 1974 Act. The zero figures were approved after the issuance of the Meeker Memorandum of May 21, 1975 advising that HUD would permit applicants to secure first year funds without submitting an expected to reside figure. The court stated, "When HUD offered the towns the . . . option . . . to submit no figure at all, and they all selected that option, they acted contrary to the clear implication of the statute, that the HAP could not be waived by the Secretary" (A 73).

The lower court in reaching this decision recognized the significant role the HAP plays in housing programs and goals established by Congress in the 1974 Act.

> The Housing Assistance Plan (HAP), which is to be completed by the applicant community, must contain a survey of the housing stock of the community, an assessment of its housing needs, a goal for the provision of assisted housing, and a description of the location of existing and proposed lower-income housing. The 1974 Act also made the HAP the basis for assistance under many of the federally-subsidized, low-

> income housing programs. As such, it is an important link between the housing and the community development sections of the Act. The significance of this cannot be overestimated. Congress left no doubt of the pivotal role it intended for the HAP by excluding it from the list of application requirements which might be waived by the Secretary (A 61).

The court further pointed out that the expected to reside portion of the HAP constituted the critical element and the "keystone to the *spatial deconcentration objective* of the 1974 Act" (A 70) (emphasis in original).

The district court's conclusion that HUD lacked the authority to waive the expected to reside provision of the HAP is derived from a reading of 42 U.S.C. § 5304. This section of the Act outlines the application and review requirements for community development grants. Part (a) of § 5304 opens with the statement, "No grant may be made pursuant to section 5306 of this title [dealing with allocation and distribution of funds] unless an application shall have been submitted to the Secretary in which the applicant . . . ." There then follow six subparts detailing what must be included in an application. In subparts (b)(3) and (4) of § 5304, Congress states the circumstances in which the Secretary may waive any of the six requirements of § 5304(a). Pursuant to (b)(3) the Secretary may waive all or part of the requirements contained in (a)(1), (2) and (3) and pursuant to (b)(4) the Secretary may accept a certification from the applicant that it has complied with the requirements of (a)(5) and (6). There is no reference in the statute to possible waiver of (a)(4), the section requiring submission of the HAP and detailing the elements of that document.

The district court, after analyzing these statutory provisions, stated that the "canon of construction *inclusio unius est exclusio alterius* compels the conclusion that the

Secretary was not empowered to waive the requirement that the application include a Housing Assistance Plan for the community" (A 68-69). The court is obviously correct in its conclusion as there is nothing in the Act which relieves the Secretary from the mandate that, "No grant shall be made . . . unless an application shall have been submitted to the Secretary in which the applicant . . . (4) submits a housing assistance plan which—(A) accurately . . . assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside in the community. . . ."

The appellants vigorously attack the district court's reasoning with respect to the waiver of the completion of the expected to reside table. They contend that the district court misread and inflated the significance of the spatial deconcentration language of the Act; that the expected to reside figure performs only a limited function in the application process; that in any event the Secretary did not waive any provision of the Act, and that the plaintiffs failed to show that the zero expected to reside figure was wrong as to the appellant towns.

The appellants in effect contend that the district court engaged in a flight of fancy in articulating what they term "the court's spatial deconcentration premise." They argue that the lower court's opinion involves an experiment in social engineering entailing resettlement of lower-income persons "more reminiscent of the heyday of federal bureaucratic planning of the 1930's and mid-1960's" (Appellants' Br. p. 33). Further, they read the district court's opinion as mandating, "willy-nilly resettlement of Hartford's low income people outside of Hartford just to get them out of the city" (Appellants' Br. p. 35) and establishing a program of dispersing people solely for dispersal's sake (Appellants' Br. p. 36).

If one is able, however, to separate this aggressive rhetoric from the appellants' legal contentions, it appears

the essential thrust of the appellants' argument is that § 5301(c)(6) does not promote a goal of deconcentration of lower-income people in a metropolitan-wide setting. Instead appellants press an interpretation of § 5301(c)(6) which calls for the reduction of isolation of groups exclusively within communities. Thus, appellants maintain the goal of reducing the "isolation of income groups within communities and geographical areas," contained in § 5301(c)(6) is to be read with sole emphasis on the term "within communities." They contend the section does not mean "between" communities. See Appellants' Br. p. 34.

The appellants' assault on the district court ruling is baseless. Their reading of § 5301(c)(6) is particularly strained. If that section was designed only to apply to the reduction of isolation of income groups exclusively within communities there would have been no need for Congress to have included the phrase "and geographical areas." The only reasonable interpretation of the term geographical areas is one involving broader areas than individual towns or cities and certainly involving metropolitan areas. This is the only reading that coincides with the declaration of purpose set forth in the first section of the Act, referring to the critical social, economic and environmental problems of our nation's cities growing out of the "concentration of persons of lower income in central cities." In order to confront the problems of the central cities and reduce the isolation of lower income persons, remedial programs must be on a metropolitan basis.

Nor does focusing on the precise types of community development activities which may be funded under the Act (Appellants' Br., p. 34) bolster the appellants' suggested interpretation of § 5301(c)(6). It is essential to recognize that the spatial deconcentration goal of the Act can only be accomplished through implementation of both Titles I and II of this legislation. As pointed out above, the HAP which is a part of the application for Title I funds, has a

direct tie in to the housing assistance programs under Title II (See pp. 11-12, *supra*). The expected to reside portion of the HAP is the critical element in accomplishing the congressional goal of spatial deconcentration. Thus, simply to focus on the programs that may be undertaken with community development funds and to state that these programs are to be "determined by the present and anticipated needs of the residents of *each separate community,*" (Appellant's Br. p. 34) is to ignore the overall structure of the 1974 Act.

The intent of Congress is unmistakable. Reduction of isolation of income groups must by necessity involve the creation of housing opportunities for lower income persons outside the inner city areas. Thus the report of the House Committee on Banking and Currency* on the 1974 Act stressed that the HAP involves an "open community" provision in regard to a community's relationship to the region as well as a dispersal feature in regard to the location of assisted housing within a community.

> The committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well. Clearly, those already employed in the community can be expected to reside there. Normally, estimates of those expected to reside in a particular community would be based on employment data generally

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* The authoritative legislative history on the 1974 Act is contained in the report of the House Committee. The House-passed version of the 1974 Act (H.R. 15361) is the source of the HAP requirement. The Senate bill (S. 3066) had directed HUD to make housing subsidies available "in general conformity" with the housing plans of the state and general unit of government. The Senate bill did not, however, define the contents of such housing plans. The final conference bill which was adopted followed the more detailed House proposal and tied the granting of community development funds into the submission of the HAP.

available to the community and to HUD. However, in many cases, communities should be able to take into account planned employment facilities as well, and their housing assistance plans should reflect the additional housing needs that will result. *Report of the House Committee on Banking and Currency,* H.R. Rep. No. 93-1114, 93rd Cong., 2d Sess. 2-3 (1974) (reprinted as addendum to Appellants' Br.).

The United States Supreme Court also recently noted the importance of the 1974 Act in promoting greater choice of housing opportunities and the avoidance of undue concentration of lower income persons. *Hills* v. *Gautreaux,* 47 L.Ed. 2d 792 (1976). In the *Gautreaux* case, the district court found that the Chicago Housing Authority had engaged in racially discriminatory site selection and tenant assignment policies in violation of the Constitution. HUD which had been joined as a defendant, was held to have violated the Fifth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, by having knowingly sanctioned and assisted the Chicago Housing Authority in its discriminatory program. After protracted litigation the issue eventually arose whether the district court, in fashioning a remedy against HUD, could direct relief on a metropolitan-wide basis. HUD had argued that since the violation had occurred exclusively within Chicago, the district court lacked the power to order corrective action beyond the municipal boundaries where the violation occurred. The Supreme Court in a unanimous decision disagreed.

In reaching its decision, the Court emphasized that the relevant geographical area for purposes of HUD's housing program activities is the Chicago housing market, not the Chicago city limits. 47 L.Ed. 2d at 804. The Court also noted that the 1974 Act "significantly enlarged HUD's role in the creation of housing opportunities." 47 L.Ed. 2d at 807. The Court referred specifically to the Section 8

housing assistance program and pointed out that HUD could contract with private owners to make lower cost housing units available. The Court in confirming the power of the district court to order metropolitan relief against HUD was clearly responding to the spatial deconcentration goals contained in the 1974 Act. The Court outlined the provisions of the HAP requirements and detailed the interconnection between the HAP and Section 8 housing projects. 47 L.Ed. 2d at 807, n.21.

> The ability of local governments to block proposed § 8 projects thus depends on the size of the proposed project and the provisions of the approved housing assistance plans. Under the 1974 Act, the housing assistance plan must assess the needs of lower-income persons residing in or expected to reside in the community and must indicate the general locations of proposed housing for lower-income persons selected in accordance with the statutory objective of "promoting greater choice of housing opportunities and avoiding undue concentration of assisted persons." . . . [*Citing the district court's ruling in the instant case.*] In view of these requirements of the Act, the location of subsidized housing in predominantly white areas of suburban municipalities may well be consistent with the communities' housing assistance plans. 47 L.Ed. 2d at 807-808, n.21.

Furthermore, all the evidence in the record here confirms the critical role the expected to reside table plays in achieving the spatial deconcentration objective. Thus, Lawrence Thompson, the Director of the Hartford area office of HUD testified that, "the only specific element of the Act . . . that operationally connects the [spatial deconcentration objectives] . . . with what we do and the applicants do is that provision pertaining to expected to reside" (T. 514-515). Also, appellees' expert Paul Davidoff testified that

the expected to reside portion of the HAP is the critical planning vehicle for deconcentration of lower income persons in metropolitan regions (A 243-247).

The appellants also argue that the Secretary of HUD did not in fact waive the expected to reside requirement, but merely deferred the completion of that table by applicants until the second year of funding. Designating the process as only a deferral does not, however, alter the fact that the towns obtained community development funds without completion of the HAP and there simply is no provision in the Act sanctioning that procedure.

Furthermore, given the significance of the expected to reside figure, the appellants are incorrect in arguing that the waiver does not undermine the integrity of Title I. HUD did not require the towns to commit themselves to applying for a second year grant as a condition for obtaining first year funds without an expected to reside figure. Thus, in the absence of the district court ruling, a town could take its first year grant without completing the HAP and then decide not to reapply in 1976. Or that town could reapply and HUD itself might disapprove the second year application. In either case, the town would have secured first year community development funds without ever providing an expected to reside commitment.

Finally, the appellants maintain that the district court has erred in concluding that six towns submitted "no figure at all" since they submitted the figure "0" (Appellants' Br., p. 42), and, in any event, a zero figure is not "plainly inconsistent" with generally available facts and data. Fortunately, little time need be spent pondering the differences between a blank table and one with a zero figure. In light of the Meeker Memorandum waiving completion of the table, the distinction is meaningless. Indeed, appellant West Hartford left its expected to reside table blank (W. Hartford Ad.Rec. Index B), while Glastonbury took the

extra effort to put in a zero figure. Are the appellants to be heard to argue that Glastonbury thereby complied with the law while West Hartford did not?

There simply is no possibility that a zero figure by the suburban towns is not plainly inconsistent with the facts. Glastonbury's own application disproves the argument. That town in fact established a reasonable expected to reside figure, described it in its application for funding, but did not include it in its HAP. See pp. 15-16, *supra*. In addition, the appellees' experts testified to a variety of methods by which the appellants could have determined reasonable expected to reside figures for the suburban Hartford towns.* The appellees also proved the availability, contrary to HUD's contention (A 125), of the 1970 census journey to work data broken down by towns within

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* The district court concluded that a wide variety of alternative data sources was available "by which the expected to reside table could have been prepared." The court summarized these materials, stating:

> For example, HUD's own instructions suggest the use of census materials; code enforcement records; local agency records; 701 plans; or studies done by reputable research, community service, or planning organizations, such as private consulting firms. The proposed HUD Regulations also list several data sources, such as approved development plans; building permits; and major contract awards. One of the plaintiffs' expert witnesses, Mr. Paul Davidoff, also listed a number of other possibilities including studies conducted by or for state agencies; plant or shopping center surveys; zip code information from the payroll records of local companies; or data gathered by the local chamber of commerce. Mr. Jonathan Colman, Director of Planning for the City of Hartford, testified that figures detailing commercial development, in the form of floor space completed or under construction, are compiled by the Connecticut Department of Commerce. The HUD Regulations and instruction sheet do not require that the data used to review grant applications be published. The standard is simply that it be "accessible . . . or . . . available to both the applicant and the Secretary. . . . " The materials and data sources described above fall within this broad category. . . . (A 81-83) (footnotes omitted).

the Hartford SMSA—the data referred to in the Meeker Memorandum. This material was secured by the appellees from the Connecticut Department of Transportation on the basis of a phone call (A 79-80, 162; Affidavit of Jonathan Colman, Oct. 22, 1975). Beyond doubt, there existed in June of 1975 readily available information by which the appellants could have completed their HAPs and they would have done so but for the interjection of the Meeker Memorandum. The issuance of that document halted all efforts to secure data and to prepare expected to reside tables.

The ruling below precisely tracks the language and requirements of the 1974 Act. Further, the injunction is narrowly drawn to insure compliance with the law and nothing more. In short, contrary to the hyperbole relating to social engineering put forth by the appellants, the opinion below merely involves a traditional and straightforward statutory interpretation.

IV

The district court correctly concluded that the Secretary of HUD had abused her discretion in approving the grant application of the Town of East Hartford.

East Hartford, unlike the other appellants, included an "expected to reside" figure, other than zero in its HAP. The district court found that the Secretary's acceptance of this application constituted an abuse of her discretion as the Town's expected to reside figure was based on inadequate data and HUD did not consider the available relevant data. East Hartford in this appeal has challenged the standard of review applied by the district court, calling instead for a standard far more deferential to any agency determination. Under its proposed standard, East Hartford contends the lower court would have been obligated to sustain HUD's approval of its HAP.

The lower court determined that under the Administrative Procedure Act, 5 U.S.C. 706, it was required "to determine in essence whether the decision [to approve the grant] was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (A 76-77). This formulation followed the rule for judicial review of administrative decisions enunciated by the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe, supra.* See also, *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281 (1974).

Appellant East Hartford asserts that the district court applied an incorrect standard in holding that the APA required the Court to determine whether HUD's approval of the town's application was based on a consideration of all relevant factors. The standard of review formulated in *Overton,* however, is explicit and unambiguous. The Supreme Court held that in reviewing an administrative decision, "the court must consider whether the decision was based on a consideration of the relevant factors . . ." and the judicial "inquiry into the facts is to be searching and careful." *Overton, supra,* 401 U.S. at 416.

Moreover, the court below has clearly followed this Court's interpretation of *Overton.* Thus, in *Hanley* v. *Mitchell,* 460 F.2d 640, 648 (2d Cir. 1972), this Court held, "it is arbitrary or capricious for an agency not to take into account all relevant factors in making its determination." In *Schicke* v. *Romney,* 474 F.2d 309, 315 (2d Cir. 1973), this obligation to conduct "a thorough, probing, in-depth review of the administrative action" was reiterated in a case involving HUD. See, also, *Jones* v. *Tully,* 378 F.Supp. 286, *aff'd per curiam sub nom. Jones* v. *Meade,* 510 F.2d 961 (1975).*

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* Appellate courts in other circuits also uniformly have interpreted *Overton* to require that administrative determinations be based upon consideration of all relevant factors. See, *e.g.,*

(*footnote continued on following page*)

In *Overton,* the Supreme Court also held that, "The Secretary's decision is entitled to a presumption of regularity. But, that presumption is not to shield his action from a thorough, probing in-depth review." 401 U.S. at 415. The *Overton* Court explicitly declined to require the production of affirmative evidence by persons challenging an administrative action in order to rebut the presumption or regularity. In *Bowman Transportation,* the Court stated that the agency must articulate a "rational connection between the facts found and the choice made," and a court itself "may not supply a reasoned basis for the agency's actions that the agency itself has not given." 419 U.S. at 285-286. Thus, while the acts of an administrator are entitled to a presumption of regularity, that presumption does not entail an overriding judicial deference to administrative decisions.

Appellant East Hartford claims that the more deferential "rational explanation" standard of review survives despite the *Overton* decision. *Noel* v. *Chapman,* 508 F.2d 1023 (2d Cir. 1975); *Raitport* v. *Nat'l Bur. of Standards,* 385 F.Supp. 1221 (E.D. Pa. 1974), and *Dimarren* v. *Immigration and Naturalization Service,* 398 F.Supp. 556 (S.D.N.Y. 1974), are cited to support this thesis. These cases fail, however, to sustain the East Harford argument as there is no indication in any of them that the *Overton* standard was not adhered to. In fact, East Hartford itself recognizes that in *Raitport* the agency determination was upheld because, "tested by either of the standards cited with approval in *Overton,* the record reveals ample grounds for ETIP's [Experimental Technology Incentives Program] refusal to approve Raitport's proposal." 385

(*footnote continued from preceding page*)

Duquesne Light Co. v. *E.P.A.,* 522 F.2d 1186 (3d Cir. 1975); *C.P.C. International, Inc.* v. *Train,* 515 F.2d 1032 (8th Cir. 1975); *Chrysler Corp.* v. *Dept. of Trans.,* 515 F.2d 1053 (6th Cir. 1975); *Sabin* v. *Butz,* 515 F.2d 1061 (10th Cir. 1975); *SEC* v. *U.S. Dept. of Labor,* 523 F.2d 10 (9th Cir. 1975).

F.Supp. at 1225. In *Noel,* the Court upheld a ruling by the Immigration and Naturalization Service, as the director's decision evidenced not simply a rational, but a "*substantial* relationship to the avowed purpose of Congress to protect the American economy." 508 F.2d at 1229.

East Hartford, referring to 42 U.S.C., § 5304(c), which sets forth standards for review of applications for community development grants, argues that the Act itself creates a presumption "that local officials have acted responsibly in submitting their grant applications" and the burden is upon the Secretary to justify disapproval of an application (Appellant East Hartford's Br., p. 6). The standards contained in § 5304(c) are, however, totally consistent with *Overton.* Thus, an application is to be approved unless the Secretary determines "on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives . . . the applicant's description of such needs and objectives is plainly inconsistent with such facts or data . . ." 42 U.S.C., 5304(c)(1). The presumption of regularity is to be afforded the application, but all relevant factors are to be accessed in determining the propriety of the application. *Overton* requires no more, no less.

The district court found that HUD approved East Hartford's application without taking those steps that would be necessary to obtain "generally available" information required for a proper evaluation of that town's application and without considering such information. In light of these findings the court concluded that the Secretary's decision of approval amounted to an arbitrary and capricious action. The court also held that the approval was given "in the face of this 'generally available' information", thereby constituting a clear error of judgment. "In other words, HUD was doubly at fault—it did not obtain the generally available information required for proper review and it acted upon the basis of inadequate information" (A 77).

As noted earlier, East Hartford in preparing its expected to reside table referred exclusively to the waiting list for the Town's own Public Housing Authority. East Hartford inserted a figure representing 40% of the waiting list, which the Town apparently concluded reflected the number of non-residents who had applied to the Housing Authority (E. Hart. Admin. Rec., Index K). Appellees submit that the district court had no choice but to reject East Hartford's computation. To do otherwise and to allow a suburban town to ascertain a housing need for non-residents solely from a waiting list for a limited and inadequate supply of public housing units would do severe violence to the goals of the 1974 Act. East Hartford's method of arriving at an expected to reside figure not only deviates from relevant and available data, but undermines the entire HAP process.

HUD itself took the position it was unable to calculate expected to reside figures for the applicants or "to make a determination as to the accuracy of the figures supplied by defendant towns" (A. 125; see also, T. 498). HUD repeatedly asserted below that because of a lack of data and the difficulties the towns themselves were having in completing the expected to reside tables, HUD suspended processing of applications in May, 1975 pending issuance of anticipated new instructions from Washington. Those new instructions were contained in the May 21, 1975 Meeker Memorandum. That memorandum effectively eliminated the need for a review process of the expected to reside tables. Indeed, the only reason East Hartford's application contained an expected to reside figure was that the Town's application was approved prior to the suspension of the review (A. 111). The fact that East Hartford submitted a figure does not for a moment indicate that HUD was able to, or undertook an evaluation of that submission. The district court had no choice but to conclude, "The record demonstrates that, so far as HUD

was concerned, that [East Hartford's] number might have had no validity whatsoever—it was untested and untestable" (A. 80).

HUD's own file on the East Hartford application in fact confirms the total inadequacy of a suburban public housing waiting list as the data base for the expected to reside table. For example, the area economist for HUD, William Flood,* stated in a memorandum, dated April 14, 1975, that:

> The Housing Authority applicant pool is only one source for information for the Table II Needs Survey. There are many more families eligible for Section 8 by virtue of higher incomes than are reflected in the P.H. waiting list. Also, to the extent that the Public Housing Authority units have a poor reputation in the community the general public will not be as willing to apply, and therefore, the waiting list will not truly reflect the total needs for housing in the community. (E. Hart. Admin. Rec. Index O.)

Mr. Flood also stated that the lack of three and four bedroom units in the Housing Authority developments further discouraged applications from persons with large families. On April 18, 1975, Mr. Flood noted again the unsatisfactory method East Hartford employed in preparing its expected to reside figure, stating that the Town must be instructed to use "a much more reliable body of current data before an approval of subsequent HAPs can take place" (*Ibid.*).

On April 10, 1975, the Director of Equal Opportunity in the area office submitted his report on East Hartford's application. He stated that the Town's HAP, "does not

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* Lawrence Thompson, Hartford Area Director, testified that Mr. Flood was the "principal person" he looked to for evaluation of an applicant's HAP (T. 488).

speak to the needs of housing of low-income who work in existing employment facilities such as Pratt & Whitney Aircraft" (*Ibid.*) In fact, this official called for the disapproval of the entire East Hartford application.

On May 19, 1975, the area director in charge of Community Planning and Development in Hartford prepared an overall covering memorandum on the East Hartford application. He stated that the area office agreed with the City of Hartford, "that a more comprehensive approach should be reflected in [East Hartford's] future HAPs." His report went on to state that the Housing Assistant Office felt that, in the absence of significant regional data, the public housing waiting list could be referred to in preparing East Hartford's initial estimate of housing needs when used along with 1970 Census data (*Id.* at Index J). East Hartford, however, looked only to the waiting list.

East Hartford argues that the district court had no right to substitute its judgment for that of the Secretary's. It argues that the court should have focused on the substance of East Hartford's expected to reside figure and not on the method by which it was obtained. The record shows, however, as outlined earlier, the towns as well as HUD, had many alternatives other than a public housing waiting list to draw upon in fashioning reasonable and adequate HAPs. See, Note, p. 43, *supra.* In light of the severe criticisms presented by HUD officials to East Hartford's method in calculating the expected to reside figure and HUD's own lack of information and refusal to test and verify the accuracy of the East Hartford submission against available data, a determination by the court as to the legal sufficiency of the method employed by the town in calculating its figure was essential and appropriate. The administrative record itself confirms the fact that HUD's review and acceptance of the East Hartford figure cannot be reconciled with the requirements of the 1974 Act.

V

The trial court's granting of injunctive relief against the appellants was proper.

The appellants, pointing out that the injunction was directed at them rather than HUD, question the authority of the trial court to issue such relief.

Initially, it should be noted that the injunctive relief was directed at the towns because HUD had issued letters of credit and the towns were authorized to draw monies from the Treasury. Of course, the district court could have ordered HUD to take steps to halt the federal payments. Because of Treasury's involvement, however, such an injunction would have been more complicated. The most direct route to the same end was simply to order the towns, who were parties, not to draw on the Treasury or expend monies pursuant to the challenged grants.

The precise terms of the injunction should also be restated. The court did not bar the appellants from obtaining the full amount of their first year grants. The court ruled that, "The Towns may seek to obtain a new approval of these grant applications from HUD. *This injunction may be lifted upon the filing with the court of such a new approval*" (A-88) (emphasis added). Thus, the appellants might still choose to comply with the terms of the 1974 Act, submit to HUD a reasonable expected to reside figure and secure their 1975 entitlement grants.

There simply is no doubt that the district court, having found a violation of the statute, had the authority (and duty) to fashion an effective remedy. Thus, the Supreme Court stated in *Hills* v. *Gautreaux, supra:*

> We reject the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD

that will affect its conduct in the greater metropolitan area. The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief. See 418 U.S., at 744. Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods, be available to formulate an effective remedy," *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 46, and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis* v. *Board of School Comm'rs,* 402 U.S. 33, 37. As the Court observed in *Swann* v. *Charlotte-Mechlenburg Board of Education:* "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 47 L.Ed.2d at 803.

The relief ordered by the district court is designed to secure compliance with the provisions of the 1974 Act while at the same time making it possible for the appellants to obtain their 1975 grants. This relief clearly comports with the direction articulated in *Gautreaux.**

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* The district court in issuing the preliminary injunction explained why the provisions of 42 U.S.C. 5311(a) dealing with remedies for noncompliance did not represent an adequate remedy for the appellees. The court noted that the method of recoupment set forth in the Act allows HUD to deduct illegally spent first-year grants from a town's second-year grant. The court stated, "Not only will *these* funds [the first year funds] be gone, expended improperly on allegedly unneeded or inappropriate projects, but *future* funds, which would have been available for projects properly within the act (and thus beneficial to plaintiffs' interests) will also be lost" (A 35) (emphasis in original).

CONCLUSION

For the foregoing reasons, the appellees submit that the decision of the district court should be affirmed in all respects.

Respectfully submitted,

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(60110)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF HARTFORD, etc., et al.,

Plaintiffs-Appellees,

against

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Defendants-Appellants,

and

CARLA A. HILLS, etc., et al.,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 30th day of July, 1976, he served two copies of the Joint Brief of Plaintiffs-Appellees on See attached list

the attorneys for see attached list by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. See attached list ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
30th day of July, 1976.

Courtney J. Brown

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